Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NOS 02-39-94, 02-62-94, 02-40-94 AND 02-63-94
LAMIN PCA, CHONG SIEW FAI CJ (SABAH & SARAWAK) AND WAN ADNAN FCJ
4, 6 AND 13 NOVEMBER 1995

Civil Procedure *— Contempt of court — Evasion of service of court order — Court order left by process server with solicitors' firm acting for party to be served — Solicitors' employee refused to acknowledge receipt under the belief that he had no authority to accept court order of personal character — Whether amounted to evasion of service — Rules of the High Court 1980 O 62 r 13*

Civil Procedure *— Contempt of court — Breach of court order and evasion of service — Standard of proof of breach — Whether affidavit evidence sufficient*

On 25 February 1993, the respondents took out a motion ('the first motion') against Wee Choo Keong ('the first appellant') and Huong Hai Kong ('the second appellant') for contempt of court in disobeying the terms of an ex parte injunction dated 9 February 1993 ('the court order'). The respondents alleged that despite the fact that the court order had been served or was deemed to have been served on the first appellant on 10 February 1993 at about 4.25pm, the first appellant still went on: (i) preparing or causing to be prepared three offending letters on 10 February 1993; (ii) placing or causing to be placed at the automated teller machines at two branches of MBf Finance Bhd ('the second respondent'), photocopies of a letter from Bank Negara Malaysia dated 22 September 1992, at about 2.30pm and 4.15pm on 11 February 1993; and (iii) making telephone calls between 10 and 16 February 1993 to the Democratic Action Party, and some depositors of the second respondent, thereby causing abnormal withdrawals of RM11,669,000 from the second respondent's branches between 11 and 16 February 1993. The first appellant, on the other hand, in his affidavit, had affirmed that he was not evading service and contended that the court order had to be personally served. Two months later, the respondents took out another motion for evasion of service of a court order against the first appellant ('the second motion'). It was alleged that the first appellant was in the solicitors' office of Wee Choo Keong & Faaiz on 10 February 1993 at about 4.25pm, and that he had instructed his secretary to inform the respondents' process server ('the process server') that he was not in the office for the purpose of avoiding service of the court order. It was further alleged that the first appellant's solicitor had also refused to acknowledge receipt of the court order. The respondents' complaint of the evasion of service was supported by the affidavit of one Thomas Lee ('Lee'), the manager in the second respondent company. The first appellant's counsel had submitted that the court order ought not to have been issued by the court because it was too wide,

was made without jurisdiction, and the respondents had no legal right of the respondents to be protected in this case. It was also argued that the trial judge should have heard the appellants' application to set aside the interim injunction first before hearing the respondents' application for committal. However, the High Court found each of the appellants guilty of the two charges of contempt of court. The first appellant was sentenced to two years' imprisonment for each charge, and the second appellant was sentenced to two weeks' imprisonment and fined RM20,000 in default six months' imprisonment for each charge. The appellants appealed against their convictions and sentences.

Held, unanimously allowing the second appellant's appeals and the first appellant's appeal against disobedience of the court order; dismissing the first appellant's appeal against contempt for evasion of service of a court order by a majority (Chong Siew Fai CJ (Sabah & Sarawak) dissenting), and substituting the two-years imprisonment sentence against the first appellant with a fine of RM7,000:

(1) (Per **Lamin PCA**) The evidence was insufficient to find the second appellant guilty for both the offences and the first appellant guilty in respect of the offence of disobedience of the court order. However, the first appellant's own firm which was acting as his solicitors, was duty-bound to accept service under O 62 r 13 of the Rules of the High Court 1980 ('the RHC') and its refusal to do so amounted to evading service. From the evidence, it was also clear that the first appellant was present in the firm at the time of service, and his refusal to accept service of the order amounted to an evasion of service.

(2) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**, dissenting in part) The contradictory evidence given by a Ting Tiew King ('Ting') regarding the preparation of the three offending letters on 10 February 1993 was to be disregarded as the evidence of a witness who is shown to have lied must be treated with great care and suspicion. Devoid of Ting's testimony, there was insufficient evidence to substantiate the point charged.

(3) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) There was no direct evidence linking the first appellant to the charge that the first appellant placed or caused to be placed photocopies of the letter from Bank Negara Malaysia at the automated teller machines of the second respondent's branch offices on 11 February 1993. There was also insufficient evidence from which his guilt could be validly inferred.

(4) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) To constitute a contempt of court through disobedience of a court order, the alleged act of contempt has to take place after the making of the court order to the knowledge of the offender or after service of the order upon him. Thus, the time of the commission of the alleged acts were highly crucial. However, the trial judge did not make a specific finding as to whether the photocopies of the

letter were placed at the automated teller machines before or after the court order was made or served. The evidence adduced was circumstantial and fell far short of the required standard of proof in contempt proceedings, ie beyond reasonable doubt.

(5) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) Further, there was also insufficient evidence for establishing that the first appellant had made or caused to be made the telephone calls as alleged. It appeared that Lee came to his conclusion that the first appellant had made or caused to be made the telephone calls, by solely relying on the second respondent's managers' reports. However, the reports were silent on the matter and none of the managers had made any affidavit.

(6) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) Deliberate evasion of service of a court order is a contempt of court, and is punished to prevent the improper interference with the administration of justice. The standard of proof in contempt proceedings is the criminal standard, ie proof beyond reasonable doubt.

(7) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) The evidence, taken in totality, was insufficient to prove beyond reasonable doubt the charge of contempt by evasion of service of the court order. There was no direct evidence regarding the allegation that the first appellant had instructed his secretary to inform the process server that he was not in for the purpose of avoiding service of the court order. Both the process server and the first appellant's secretary did not give evidence, and it seemed that Lee's affidavit was based on the information provided by the process server. Although hearsay evidence in affidavit is admissible under O 41 r 5(2) of the RHC, the court should ensure that no injustice results from its admission.

(8) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) Further, there was no evidence of the first appellant instructing his solicitor not to acknowledge receipt of the court order. In fact, it was the respondents' case in the first motion that the court order had been served or deemed to have been served on the first appellant on 10 February 1993 at about 4.25pm, a complete about-turn of stand from the allegation in the second motion that the first appellant had evaded service. As long as the court order had already been served, it was irrelevant that the second appellant returned the court order or failed to mention the receipt of it in his letter to the respondents' solicitor.

(9) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) The refusal to acknowledge receipt of a court order is in itself no evasion of service, particularly where it is the case that service had been effected by leaving the document with the party to be served.

(10) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) An honest and reasonable belief in the existence of circumstances which, if

true, would make the alleged act an innocent act, will amount to a good defence. In this case, the first appellant's solicitor refused to accept service of the court order as he genuinely believed that he had no authority to accept service of an order of a personal character under the RHC, rather than to evade service.

Cases referred to

A-G v Newspaper Publishing plc and Ors [1988] Ch 333 (folld)
Bramblevale Ltd, Re [1970] Ch 128 (folld)
Caswell v Powell Duffryn Associated Collieries Ltd [1940] AC 152 (folld)
Dean v Dean [1987] 1 FLR 517 (folld)
Khoon Chye Hin v PP [1961] MLJ 105 (folld)
Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV & Ors (No 2) (1988) TAER 975 (folld)
Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433 (folld)
Tay Seng Keng v Tay Ek Seng Co Sdn Bhd [1978] 1 MLJ 126 (folld)

(11) (Per **Wan Adnan FCJ**) The submission of the appellants that the court order should not be issued was not relevant in contempt of court proceedings, although it was relevant and might be valid in proceedings to set aside the injunction. Until it was set aside, the court order was valid and must be obeyed.

(12) (Per **Wan Adnan FCJ**) Even if the trial judge had allowed the appellants to proceed first with their application to set aside the court order, and they had succeeded in setting aside the order, this would not affect the culpability of the appellants for their disobedience of the court order before it was set aside, if the allegations of disobedience had been proved.

Cases referred to

Alligarh Municipal Board & Ors v Ekka Tonga Mazdoor Union & Ors AIR 1970 SC 1707 (folld)
Bramblevale Ltd, Re [1970] Ch 128 (folld)
Garden Cottage Foods v Milk Marketing Board [1983] 2 All ER 770; [1983] 3 WLR 143 (folld)
Loot Ting Yee v Tan Sri Sheikh Hussein bin Sheikh Mohamed & Ors [1982] 1 MLJ 321 (folld)
Montgomery v Montgomery [1964] 2 All ER 22; [1964] 2 WLR 1036 (folld)
Wee Choo Keong v MBf Holdings & Anor and another appeal [1993] 2 MLJ 219 (folld)

[Bahasa Malaysia summary

Pada 25 February 1993, penentang memulakan suatu usul ('usul pertama') terhadap Wee Choo Keong ('perayu pertama') dan Huong Hai Kong ('perayu kedua') atas penghinaan mahkamah kerana tidak mematuhi terma suatu injunksi ex parte yang bertarikh 9 Februari 1993 ('perintah mahkamah'). Penentang mengata bahawa sungguhpun perintah mahkamah telah ataupun boleh dianggap telah

A disampaikan kepada perayu pertama pada 10 Februari 1993 pada kira-kira 4.25 petang, perayu pertama masih: (i) menyediakan atau menyebabkan penyediaan tiga pucuk surat yang memudaratkan pada 10 Februari 1993; (ii) meletak atau menyebabkan perletakan pada mesin 'auto teller' di dua cawangan MBf Finance Bhd ('penentang kedua'), fotokopi sepucuk surat daripada Bank Negara Malaysia B bertarikh 22 September 1992 pada 2.30 dan 4.15 petang pada 11 Februari 1993; dan (iii) membuat panggilan telefon di antara 10 dan 16 Februari 1993 kepada Parti Tindakan Demokratik, dan beberapa orang penyimpan penentang kedua, lalu menyebabkan pengeluaran wang yang luar biasa sejumlah RM11,669,000 dari C cawangan penentang kedua di antara 11 dan 16 Februari 1993. Perayu pertama pula, di dalam afidavitnya, berikrar bahawa beliau tidak mengelakkan diri daripada penyampaian dan menghujah bahawa perintah mahkamah harus disampaikan secara peribadi. Dua bulan kemudian, penentang memulakan suatu lagi usul atas pengelakan penyampaian perintah mahkamah terhadap penentang pertama ('usul D kedua'). Adalah dikatakan bahawa perayu pertama sesungguhnya berada di pejabat peguam Wee Choo Keong & Faaiz pada 10 Februari 1993 pada kira-kira 4.25 petang, dan telah mengarahkan setiausahanya untuk memberitahu penyampai saman ('penyampai saman') bahawa beliau tidak berada di dalam pejabat, untuk tujuan mengelakkan E penyampaian perintah mahkamah. Selain daripada itu, penentang juga mengatakan bahawa peguamcara perayu pertama enggan memaklumi penerimaan perintah mahkamah itu. Aduan penentang tentang pengelakan penyampaian disokong oleh afidavit Thomas Lee ('Lee'), seorang pengurus di syarikat penentang kedua. Peguam perayu pertama mengatakan bahawa perintah mahkamah tidak harus F dikeluarkan oleh mahkamah kerana ia adalah terlalu luas, ia dibuat tanpa bidang kuasa, dan penentang tidak mempunyai hak di sisi undang-undang yang harus dilindungi. Perayu pertama juga berhujah bahawa hakim perbicaraan sepatutnya membicarakan permohonan perayu untuk mengenepikan injunksi dahulu sebelum mendengar G permohonan penentang untuk komital. Bagaimanapun, Mahkamah Tinggi mendapati setiap perayu bersalah atas dua pertuduhan penghinaan mahkamah. Perayu pertama telah dijatuhkan hukuman penjara dua tahun untuk setiap pertuduhan, dan perayu kedua pula dihukum penjara selama dua minggu dan denda RM20,000, atau enam bulan penjara jika ingkar membayar denda, untuk setiap H pertuduhan. Perayu merayu terhadap sabitan dan hukuman mereka.

Diputuskan, dengan sebulat suara membenarkan rayuan perayu kedua dan rayuan perayu pertama terhadap ketidakpatuhan perintah mahkamah; tetapi menolak rayuan perayu pertama terhadap penghinaan mahkamah akibat pengelakan perintah mahkamah dengan I majoriti (Chong Siew Fai HB (Sabah & Sarawak) bertentangan), dan menggantikan hukuman pemenjaraan selama dua tahun terhadap perayu pertama dengan denda sejumlah RM7,000:

(1) (Oleh **Lamin PMR**) Keterangan adalah tidak mencukupi untuk memutuskan bahawa perayu kedua bersalah atas kedua-dua kesalahan, dan bahawa perayu pertama bersalah atas kesalahan

tidak mematuhi perintah mahkamah. Walau bagaimanapun, firma perayu pertama sendiri yang telah bertindak sebagai peguamcara beliau, adalah bertanggungjawab untuk menerima penyampaian di bawah A 62 k 13 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan keengganannya untuk berbuat demikian merupakan pengelakan penyampaian. Daripada keterangan, adalah juga jelas bahawa perayu pertama berada di firma tersebut pada masa penyampaian dan keengganan beliau untuk menerima penyampaian perintah itu merupakan suatu pengelakan penyampaian.

(2) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**, bertentangan sebahagian) Keterangan bercanggahan yang diberikan oleh seorang yang bernama Ting Tiew King ('Ting') berkenaan dengan penyediaan tiga pucuk surat yang memudaratkan pada 10 Februari 1993 harus diabaikan kerana keterangan seorang saksi yang ditunjukkan telah bercakap bohong mesti diambil dengan berhati-hati dan sangsi. Dengan ketiadaan testimoni Ting, tidak terdapat keterangan yang mencukupi untuk mengesahkan perkara yang dipertuduhkan.

(3) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Tidak terdapat keterangan terus yang menghubungkan perayu pertama kepada pertuduhan bahawa perayu pertama telah meletak atau menyebabkan perletakan fotokopi surat daripada Bank Negara Malaysia pada mesin 'auto teller' di cawangan penentang kedua pada 11 Februari 1993. Juga, tidak terdapat keterangan yang mencukupi untuk membuat inferans tentang kesalahannya.

(4) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Seseorang itu akan dianggap sebagai melakukan penghinaan mahkamah akibat ketidakpatuhan suatu perintah mahkamah, jika kelakuan menghina yang dikatakan itu berlaku selepas perintah mahkamah tersebut dibuat atas pengetahuan pesalah, atau selepas penyampaian perintah itu kepadanya. Maka, masa bila kelakuan yang dikatakan itu telah dibuat adalah sangat penting. Walau bagaimanapun, hakim perbicaraan tidak membuat keputusan yang spesifik sama ada fotokopi surat tersebut diletakkan pada mesin 'auto teller' sebelum atau selepas perintah mahkamah itu dibuat atau disampaikan. Keterangan yang dikemukakan adalah keterangan mengikut keadaan dan tidak mencapai taraf bukti yang diperlukan di prosiding penghinaan, iaitu melampaui keraguan yang munasabah.

(5) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Lagipun, tidak terdapat keterangan yang memadai untuk membuktikan bahawa perayu pertama telah buat atau menyebabkan pembuatan panggilan telefon seperti yang telah dikatakan. Nampaknya, Lee mencapai keputusannya bahawa perayu pertama telah membuat atau menyebakan pembuatan penggilan telefon, hanya berdasarkan laporan pengurus penentang kedua. Walau bagaimanapun, laporan tersebut senyap tentang perkara

A itu dan tidak satupun daripada pengurus yang berkenaan telah membuat afidavit.

(6) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Pengelakan penyampaian perintah mahkamah secara sengaja merupakan suatu penghinaan mahkamah, dan kelakuan ini adalah dihukum B untuk menghalang gangguan pentadbiran keadilan yang tidak wajar. Taraf bukti di dalam prosiding penghinaan ialah taraf jenayah, iaitu bukti melampaui keraguan munasabah.

(7) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Keterangan kes ini apabila dipertimbangkan secara keseluruhannya, tidak mencukupi untuk membuktikan sehingga melampaui keraguan C munasabah pertuduhan penghinaan dengan mengelak penyampaian perintah mahkamah. Tidak terdapat keterangan terus mengenai pengataan bahawa perayu pertama telah mengarahkan setiausahanya untuk memberitahu penyampai saman bahawa beliau tidak berada di pejabat untuk tujuan D mengelakkan penyampaian perintah mahkamah. Kedua-dua penyampai saman dan setiausaha perayu pertama tidak memberi keterangan, dan nampaknya afidavit Lee adalah berdasarkan maklumat yang diberikan oleh penyampai saman. Walaupun keterangan dengar cakap di dalam afidavit boleh diterima di E bawah A 41 k 5(2) KMT, mahkamah harus memastikan bahawa tidak ada ketidakadilan disebabkan akibat penerimaannya.

(8) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Juga, tidak terdapat keterangan bahawa perayu pertama mengarahkan peguamnya supaya jangan mengesahkan penerimaan perintah F mahkamah. Sesungguhnya, adalah kes penentang di dalam usul pertama bahawa perintah mahkamah telah disampaikan atau boleh dianggap telah disampaikan kepada perayu pertama pada 10 Februari 1993 pada kira-kira 4.25 petang, dan ini adalah betul-betul bercanggahan dengan pengataan di usul kedua bahawa perayu pertama telah mengelakkan penyampaian. Selagi G perintah mahkamah telah disampaikan, adalah tidak relevan bahawa perayu pertama mengembalikan perintah mahkamah atau gagal menyebut tentang penerimaannya di dalam surat beliau kepada peguamcara penentang.

(9) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Keengganan H untuk memaklumkan penerimaan perintah mahkamah semata-mata, bukan merupakan pengelakan penyampaian, terutamanya jika penyampaian telahpun dijalankan dengan meninggalkan dokumen dengan pihak yang harus disampaikan.

(10) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Suatu I kepercayaan yang jujur dan munasabah di dalam kewujudan sesuatu keadaan, yang jika benar, akan menyebabkan suatu kelakuan yang dikatakan itu suatu kelakuan yang tidak bersalah, merupakan suatu pembelaan yang baik. Di dalam kes ini, peguamcara perayu pertama enggan menerima penyampaian perintah mahkamah kerana beliau dengan ikhlas mempercayai

bahawa beliau tidak mempunyai kuasa untuk menerima penyampaian perintah yang bersifat peribadi, dan bukannya kerana untuk mengelakkan penyampaian.

(11) (Oleh **Wan Adnan HMP**) Pengataan perayu bahawa perintah mahkamah tidak harus dikeluarkan adalah tidak relevan di dalam prosiding penghinaan mahkamah, walaupun ia adalah relevan dan mungkin adalah sah di dalam prosiding pengenepian injunksi. Walau bagaimanapun, sehingga ia diketepikan, perintah mahkamah adalah sah dan harus dipatuhi.

(12) (Oleh **Wan Adnan HMP**) Jikapun hakim perbicaraan telah membenarkan perayu untuk meneruskan permohonan mereka untuk mengenepikan perintah mahkamah dahulu, dan mereka berjaya mengenepikan perintah tersebut, ini tidak akan mempengaruhi kebersalahan perayu kerana ketidakpatuhan perintah mahkamah sebelum ia diketepikan, jika pengataan ketidakpatuhan tersebut adalah dibuktikan.]

Notes

For cases on contempt of court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 788–837.

Complete list of cases referred to

A-G v Newspaper Publishing plc and Ors [1988] Ch 333; [1987] 3 All ER 276
Alligarh Municipal Board & Ors v Ekka Tonga Mazdoor Union & Ors AIR 1970 SC 1707
Bramblevale Ltd, Re [1970] Ch 128
Caswell v Powell Duffryn Associated Collieries Ltd [1940] AC 152
Dean v Dean [1987] 1 FLR 517
Garden Cottage Foods v Milk Marketing Board [1983] 2 All ER 770; [1983] 3 WLR 143
Khoon Chye Hin v PP [1961] MLJ 105
Loot Ting Yee v Tan Sri Sheikh Hussein bin Sheikh Mohamed & Ors [1982] 1 MLJ 321
Montgomery v Montgomery [1964] 2 All ER 22; [1964] 2 WLR 1036
Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV & Ors (No 2) (1988) TAER 975
Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433
Tay Seng Keng v Tay Ek Seng Co Sdn Bhd [1978] 1 MLJ 126
Wee Choo Keong v MBf Holdings & Anor and another appeal [1993] 2 MLJ 219

Legislation referred to

Rules of the High Court 1980 O 41 r 5(2), O 52 r 2(2), O 62 r 13

Appeal from: Civil Suit No S4–22–75–93 (High Court, Kuala Lumpur)..

Raja Aziz Addruse (*Wee Choo Chin* with him) (*Wee Choo Keong & Faaiz*) for the first appellant.

A *Christopher Fernando* (*Ivan Wong* with him) (*Aris Rizal Christopher Fernando & Co*) for the second appellant.

SC Loh (*Tay Hong Huat, Evelyn Khoo* and *Ranjit Singh* with him) (*Cheang & Ariff*) for the respondent.

B *4 November 1995*

Lamin PCA: This is an appeal by the first and the third defendants against the decision of the judge of the High Court who on 31 December 1993, found them guilty of contempt. They were sentenced on 28 January 1994. The first defendant was sentenced to two weeks' imprisonment and a RM20,000 fine in default six months' imprisonment for the offence of C disobedience of the court order as per the plaintiffs' application for committal in encl 27. For the offence of evading the service of the same order as per the plaintiffs' application for committal in encl 102, he was also sentenced to two weeks' imprisonment and a RM20,000 fine in default six months' imprisonment. The third defendant, on the other D hand, was sentenced to two years' imprisonment for each of the two offences. They were to run concurrently.

(The second defendant was absent throughout the whole proceedings before the court below.)

For the purposes of the present appeal, we refer to the first defendant E [Houng Hai Hong] as the first appellant and the third defendant [Wee Choo Keong] as the second appellant.

Upon reading the records and hearing the arguments before us, we were unanimous in our finding, with respect to the first appellant that the evidence was insufficient to find him guilty for both the offences. We F therefore allowed the appeals and set aside the sentences.

With regard to the second appellant (third defendant), we were also unanimous in our finding, but only in respect of the offence of disobedience of the court order for the same reason. We therefore allowed the appeal and set aside both the finding of guilt and the sentence as imposed. For the G offence of evading the service of the court order, we, by a majority decision, agreed with the finding of guilt by the learned judge below, but disagreed with the sentence imposed. We therefore dismissed the appeal on the finding of guilt and allowed the appeal on sentence. We set aside the sentence of imprisonment and substituted it with a fine in the sum of RM7,000.

H However, we in the majority, wish to add to what has been said by the learned judge below, the following. We noted that the firm of Wee Choo Keong & Faaiz on 10 February 1993 wrote to Messrs Cheang & Ariff, solicitors for the plaintiffs and informed them that they were acting for the second appellant. The sentence that followed which we will quote I here, is of great significance and it reads, 'We have been informed by our client that our client has heard a rumour that your clients have filed a summons against our client.'

It is amazing that in the context in which the letter was written, a professional could use the word 'rumour'. First, why the need to write to the other side merely to say that their information was only a 'rumour'. He

could simply telephone. He was in Jalan Raja Laut while the other at Jalan Yap Kwan Seng. From Jalan Raja Laut, he could even walk to the High Court registry to enquire. He could have got a clear-cut answer. Again the news about the case including the issuing of the order appeared in *The Star* the same day (10 February 1993). For a politician, especially one residing in a city, and for that matter almost anyone, the first item on the breakfast menu is the morning papers. We were more than convinced that the second appellant knew about the case and the existence of the order in the morning of 10 February 1993. By employing the word 'rumour', we could not equate the mind of the writer of the letter to the innocent mind of a newly born babe. By that, we simply mean that the second appellant was not honest.

Further, two days before (8 February 1993) there was wide publicity in the Chinese newspapers, such as *Nanyang Siang Pau* (02–40–94 Vol C at p 679), *Sin Chew Jit Poh* (02–40–94 Vol C at p 680), and *Shin Min Daily News* (02–40–94 Vol C at p 683) about the lodging of a police report by the second appellant (third defendant) against Tan Sri Dato' Loy Hean Hong regarding certain business transactions which the second appellant considered illegal. With that kind of accusations contained in a police report and made public through the media, one can only expect the second appellant to be anxious as to the result of the publicity of his police report. Therefore, we would be surprised if he did not closely watch the media for its further development. We therefore had no doubt whatsoever that the second appellant had knowledge of his case before the High Court, and the existence of the order issued against him by the morning of 10 February 1993. His solicitors' letter of 10 February 1993 (exh SM1:TL4) begins with the words 'We act for Mr Wee Choo Keong ...' on a letterhead of the firm of Wee Choo Keong & Faaiz. This shows that his own firm was acting for him and the letter further asks for 'all the cause papers' to be served on the firm. In that case, O 62 r 13 of the Rules of the High Court 1980 should apply so that 'all writs, notices, pleadings, summonses, orders' would be served on the solicitor who was acting for his client. The firm of Wee Choo Keong & Faaiz had no valid ground to refuse the service of the order.

In the case before us, the second appellant is the senior partner of his own firm. The solicitors retained by him were no other than his own firm. On his instruction, his own firm undertook to accept service of all cause papers. The papers were served at the premises of his own firm. The letter of undertaking to accept service was sent and received on the same day. The service was done the same afternoon. There was no denial at any time by the second appellant that he was not in the firm that day. There was no statement by him that he was out of town or out of Malaysia that day. There was no statement from him or his firm to the effect that when he gave the instruction pertaining to the undertaking to accept service that he did it from outside the firm. In the circumstances, by our judgment in this case, we say firstly that, by an irresistible inference that the second appellant was in the firm when the service of the cause papers together with the order was made. According to S Mahendran, the process server, after he

handed over to Ivan Wong the cause papers together with the order, Ivan Wong went into the 'inner office'. According to Ivan Wong, he took the cause papers 'to a large conference table in our library' as the receptionist's table was too small. We say there are only a few documents, and one does not need a conference table. It was only a lame excuse. He went in to consult the second appellant. Secondly, we say that after having given the undertaking to accept service, his firm was duty-bound to accept the service of the order. Being in the same firm, there was absolutely no difficulty in consulting the second appellant there and then, and the refusal to accept service of the order had no justification whatsoever. Thirdly, we say that even assuming that the second appellant was not in when the process server came, Ivan Wong in particular or whoever in the firm in fact acting for him was duty-bound to inform the process server where the second appellant could be reached after having told him that the order was required to be served personally. Ivan Wong and the firm were silent on this. However, we repeat that the second appellant was present in the firm at the time of service, and the refusal to accept service of the order amounted to an evasion of service. Also, we wish to repeat that in the circumstances of this case, that the second appellant's own firm in the capacity of retained solicitors was duty-bound to accept service on behalf of the second appellant, and its refusal to accept service amounted to evading service.

Again with the use of the word 'rumour' and if this is to be taken that both the second appellant and his firm (being his solicitors) had no factual knowledge of the case having been filed, meaning that it was truly a rumour, then even at the stage of 'rumour', both the second appellant and his solicitors were already making an effort to ascertain whether there was already a case filed against the second appellant, and in that light, it is reasonable to conclude that they were too eager to be served with the cause papers in order to know the nature of the case against the second appellant. But when the process server came to effect service and after having perused all the documents, they found an order of the court. After having realized the purport of the order, they refused to accept service. Since they were too eager to be served with the cause papers and to know the nature of the case, it was reasonable to conclude that the second appellant must have been in the firm when the process server came. In the present case, as we have said earlier both the client and his solicitors were in the same firm and occupying the same premises, and that there was no evidence from the firm that the second appellant could not be contacted (being eager to know the nature of the case he must have been around). It was therefore at his own peril that he and his firm refused to accept service of the order.

In the matter of defence, there was absolutely no ground to give the second appellant the benefit of the doubt. At best, his defence could only be termed as a bare denial.

As regards sentence, we were of the view that in the circumstances of the case, a fine of RM7,000 was reasonable.

13 November 1995

Chong Siew Fai CJ (Sabah & Sarawak) (dissenting in part):

Introduction

Before us, there were two appellants:

(1) Wee Choo Keong (hereinafter referred to as 'Wee') in Appeal Nos 02–39–94 and 02–62–94; and

(2) Huong Hai Kong (hereinafter referred to as 'Huong') in Appeal Nos 02–40–92 and 02–63–94.

They were respectively the third and the first defendants in High Court Civil Suit No S4–22–75–93. Each of them was charged with contempt of court as follows:

(a) disobeying the terms of an injunction order of court (ex parte) dated 9 February 1993; and

(b) evading service of the said ex parte court order dated 9 February 1993.

The High Court of Kuala Lumpur found each of them guilty of the two charges for which the following punishments were imposed:

(1) Wee was sentenced to two years' imprisonment for each charge; and

(2) Huong was sentenced to two weeks' imprisonment and fined RM20,000 in default six months' imprisonment for each charge.

Stay of execution of the sentences was granted.

Against the decisions, the two appellants appealed. All the four appeals were heard together.

On 14 February 1995, the two appeals by Huong were unanimously allowed with costs here and below. The imprisonment sentences and the fines were set aside. Wee's appeal against disobedience of the court order dated 9 February 1993 was unanimously allowed with costs here and below. The two-year imprisonment sentence was set aside. His appeal against the contempt for evasion of service of the said court order was, by a majority decision of two to one, dismissed with costs to the respondents, and the imprisonment sentence of two years was altered to one of fine of RM7,000.

Disobedience of the court order

In the case of Wee (similarly in the case of Huong), my learned judges and I agreed that the evidence adduced was insufficient for finding him guilty of the charge of disobedience of the court order. I would, however, add the following observations.

The acts alleged to have been done by Wee constituting disobedience of the court order dated 9 February 1993 were:

(a) preparing or causing to be prepared three offending letters on the night of 10 February 1993;

(b) placing or causing to be placed at the automated teller machines at the Salak South and the Kepong branch offices of the second respondent (second plaintiff), MBf Finance Bhd, photocopies of a letter dated 22 September 1992 from Bank Negara Malaysia on 11 February 1993, at about 2.30pm and 4.15pm, respectively; and

(c) making or causing to be made between 10 February 1993 and 16 February 1993 telephone calls to the sub-committee of the Democratic Action Party at Sungai Ruan, and to the depositors of the said MBf Finance Bhd residing in Temerloh dissipating certain information thereby causing abnormal withdrawals of RM11,669,000 from the Raub and the Mentakab branches of the said MBf Finance Bhd between 11 February 1993 and 16 February 1993.

Wee denied all the allegations against him.

As to (a) above, ie preparing or causing the preparation of the three offending letters on the night of 10 February 1993, the evidence came principally from Ting Tiew King ('Ting'). Ting, however, gave contradictory versions on the same subject matter. In his affidavit made on 18 February 1993, he said that he and Wee were in the latter's office in the evening of 10 February 1993, where Wee prepared one of the letters and asked him to sign; but subsequently in his statutory declaration made on 8 March 1993, he denied having met Wee after about 4pm on 10 February 1993. He further said that he was 'under tremendous fear, pressure, anxiety and confusion', had no legal advice, did not understand the contents, and had no choice when he signed the affidavit, explaining the situation under which he signed. In the circumstances, Ting's affidavit evidence, in our view, ought to have been ignored and not relied on.

Generally, as to the weight to be attached to the evidence of a witness who is shown to have lied, Thomson CJ in *Khoon Chye Hin v PP* [1961] MLJ 105 observed (at p 107):

> If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinized with great care and indeed with suspicion.

In *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433, Lord Templeman said (at p 436):

> If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations.

In the instant case under appeal, the situation is worse: the deponent, Ting, had himself made contradictory statements, and the contradiction strikes at the core of the charge. On the very point as to whether Ting was with Wee in the latter's office on 10 February 1993 doing the work as alleged, Ting's affidavit and his statutory declaration cannot both be true; one of them must necessarily be false. In the circumstances, Ting's evidence on the point must be disregarded. Devoid of Ting's testimony, there is no or no sufficient evidence to substantiate the point charged.

As regards item (b), ie placing or causing to be placed photocopies of the letter from Bank Negara Malaysia at the automated teller machines at the Salak South and the Kepong branches of MBf Finance Bhd on 11 February 1993, there is no direct evidence linking Wee to this charge. Nor, in our view, is there sufficient evidence from which Wee's guilt could be validly and safely inferred. Wee, on the other hand, besides denying the charge, also deposed (and it was not disputed) that after his speech in the Parliament on 10 and 11 November 1992, he had, at the requests of many reporters, given away copies of the letter from Bank Negara Malaysia.

Furthermore, in view of the proximity of time between the service of the court order dated 9 February 1993 (10 February 1993 at about 4.20pm) and the discovery of photocopies of Bank Negara Malaysia's letter at the automated teller machines of the Salak South and Kepong branches of MBf Finance Bhd on 11 February 1993 at about 2.30pm and 4.15pm (see appeal record of Civil Appeal No 02-62-1994 at p 217 para 10), the time at which the photocopies of the letter were placed at the automated teller machines aforesaid became crucial for the purpose of determining whether there was a breach of the injunction order dated 9 February 1993. For example, in point of time, there could be no breach of the court order constituting contempt, if the photocopies were placed at the automated teller machines before the making of the order, or without knowledge of the order or before service of the order. In the judgment of the learned trial judge, there is no specific finding as to the time the photocopies of the Bank Negara Malaysia's letter were placed at the said automated teller machines.

The evidence adduced is circumstantial and is such that, taken separately or in totality, it falls far short of being capable of proving to the required standard in contempt proceedings, ie proof beyond reasonable doubt, that the acts or any thereof were done or caused to be done by Wee.

As regards item (c), ie making or causing telephone calls to be made to the sub-committee of the Democratic Action Party and to depositors between 10 February 1993 and 16 February 1993 thereby causing abnormal withdrawals of money from the two MBf Finance Bhd branches, the evidence adduced by the plaintiffs is again far from being satisfactory.

In the affidavit of Thomas Lee Koon Seng ('hereinafter referred to as 'Thomas Lee') affirmed on 20 February 1993 verifying the statement filed pursuant to O 52 r 2(2), Thomas Lee relied on the reports (exh TL19) made by the branch managers and the senior managers of MBf Finance Bhd, and came to what he terms as 'the only reasonable inference and conclusion' that Wee made or caused to be made the telephone calls. (See the appeal record Pt B at pp 218 and 219 in Civil Appeal No 02-62-1994.) None of the reports said anything about Wee making telephone calls or causing them to be made. None of the managers who made the reports made any affidavit.

In the affidavit of Tan Hor Lee affirmed on 4 March 1993, Tan said that 'sometime in February 1993', the exact date he could not recall, Wee, in a telephone conversation asked him to get some depositors of MBf Finance Bhd to withdraw their money from the said finance company, and

A that he (Tan) expressed that he had no ability to make the arrangement. Two points emerged significantly from the above statement:

(i) Tan was not sure of the date. All he could say was 'sometime in February 1993'. In the context of the present contempt proceedings, time is highly material. To constitute a contempt of court through
B disobedience of the court order made on 9 February 1993, the alleged act of contempt had to have taken place after the making of the court order to the knowledge of the offender or after service of the order upon him. The term 'sometime in February 1993' is vague and unhelpful in the circumstances; and

C (ii) on Tan's own evidence, he did not make the arrangement as allegedly requested by Wee. Wee, on the other hand, denied the allegation. Moreover, Tan's credibility was to an extent tainted by the affidavit evidence of Tee Swee and Teh Piah Teng alleging Tan conveying the message and prompting Tee to be a witness for money. In their affidavits (including Tan's), there are also allegations and counter-
D allegations of matters the effect of which seriously attacks credibility. It is not surprising that the learned trial judge made no mention of the affidavits. In our view, they hardly possess any evidential value on the issue in question.

In his grounds of judgment, the learned trial judge made reference to the
E abnormal withdrawals of money from the Raub and the Mentakab branches of the MBf Finance Bhd, and concluded:

> Having regard to the events taking place from 9 February 1993, there is no doubt in my mind that the third defendant had caused all these phone calls to be made to Raub and Temerloh with the intention to cause injury and
F damage to the plaintiffs.

We have examined the evidence relevant to the issue. With the greatest respect, we are of the view that the evidence falls far below the standard of proof required by the law in contempt proceedings. There is no or insufficient evidence, direct or otherwise, capable of establishing or validly
G and properly inferring that Wee had made or caused to be made the telephone calls as alleged.

Evasion of service of the court order dated 9 February 1993

As I dissented from the majority decision of dismissing Wee's appeal
H against contempt for evasion of service of the court order dated 9 February 1993, I shall now give my reasons.

Law

Deliberate or intentional evasion of service of an injunction order of court
I thereby constituting an interference with the administration of justice is a contempt of court, and is punished not for the purpose of vindicating the dignity of the court, but to prevent the improper interference.

Though it is sought to commit a party to a civil action for contempt and the proceedings are interlocutory, the standard of proof is the criminal standard, ie proof beyond reasonable doubt.

In *Tay Seng Keng v Tay Ek Seng Co Sdn Bhd* [1978] 1 MLJ 126, Gill CJ (Malaya) (as he then was) referred to *Re Bramblevale Ltd* [1970] Ch 128, which required the proof of contempt of court to be beyond reasonable doubt, and obviously accepted the test when he said (at p 127):

> ... it was quite impossible to say that the guilt of the appellant had been proved with such strictness of proof as is consistent with the test of 'beyond reasonable doubt'.

In *Re Bramblevale Ltd* [1970] Ch 128, Lord Denning MR said (at p 137):

> A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt.

See also *Dean v Dean* [1987] 1 FLR 517; *A-G v Newspaper Publishing plc & Ors* [1988] Ch 333; [1987] 3 All ER 276.

Motions

Before dealing with the plaintiffs' motion dated 13 May 1993 for contempt against Wee on ground of evasion of service, a brief recitation of an earlier motion of the plaintiffs against Wee, also for contempt, respecting which Wee was vindicated in this appeal, is necessary.

On 25 February 1993 (over two months' before the above motion on evasion of service), the plaintiffs took out a motion for contempt against Wee alleging disobedience of the injunction order of the High Court made on 9 February 1993 on the part of Wee by several acts respecting which I have already dealt with, and of which Wee had been held not guilty in this appeal. What is of significance, however, is that in that first motion, it was the case of the plaintiffs that the said court order had been served or deemed to have been served on Wee on 10 February 1993 at about 4.25pm — a complete about-turn of stand from that held by the plaintiffs in the second motion where the plaintiffs contended that Wee had evaded service, meaning that Wee had not been served on the date and time above-mentioned. An important point to note in this connection is that there is no evidence from either the process server, S Mahendran, or his companion, Leong Kwok Yan, that they had, at any material time on that afternoon of 10 February 1993, expressed an intention or wish to serve Wee personally.

Judgment of the High Court

Holding that Wee had evaded service of the said court order on 10 February 1993 at about 4.25pm and was therefore in contempt, the learned trial judge in his judgment:

(a) found that Wee instructed his legal firm 'to accept service of all court's matters including the order of the court'. With respect, the letter dated 10 February 1993 from Messrs Wee Choo Keong & Faaiz to Messr Cheang & Ariff stated 'all the cause papers pertaining to this matter'. There is, on record, no evidence that Wee had specifically instructed accepting service of the court order. Neither is

A there any evidence that prior to the arrival of S Mahendran at Wee's solicitor's office on 10 February 1993, Wee and Ivan Wong knew that the court order was to be served. But even on the basis that the term 'cause papers' could be interpreted to include the court order, it was, as mentioned above, and will be further discussed later, the plaintiffs' own case that the court order had been served on 10 B February 1993 at about 4.25pm.

(b) believed that Wee was in his office when the plaintiffs' process server S Mahendran arrived to effect service on 10 February 1993 at about 4.25pm, preferring what the receptionist (unidentified or unnamed) was said to have said that Wee was in the office to what Wee's C secretary was purported to have said that Wee was not in. I use the phrase 'purported to have said' because, as will be shown later, there is, on record, no direct or credible evidence of the alleged utterance of the secretary.

(c) believed that Wee instructed Ivan Wong not to accept the court D order; and

(d) held that Wee himself refused to acknowledge service of the court order.

Evasion of service — grounds relied on and affidavit of verification — appeal

E The grounds relied on by the plaintiffs in support of the complaint of Wee's evasion of service of the court order are contained in the statement dated 12 May 1993 pursuant to O 52 r 2(2) with the affidavit of Thomas Lee affirmed on 11 May 1993 verifying the facts relied on.

I shall now deal with Thomas Lee's said affidavit of verification F (hereinafter referred to as the 'verification affidavit') in support of the facts alleged in the grounds contained in the said statement.

In para 6(iv) of the verification affidavit (verifying para 4(a)(iv) of the statement), Thomas Lee believed that Wee was in the solicitors' office on 10 February 1993 at about 4.25pm, and that Wee had instructed his G (Wee's) secretary to inform the plaintiffs' process server (S Mahendran) that Wee was not in the said office for the purpose of preventing or avoiding service of the court order dated 9 February 1993. Thomas Lee's belief seemed to be based on his having been allegedly informed by S Mahendran that on the latter's arrival at Wee's solicitors' office, a receptionist (unidentified or unnamed) had told him that Wee was in, but H that subsequently after making known the purpose of his visit, Wee's secretary (also unidentified or unnamed) told him that Wee was not in.

But neither the secretary nor the receptionist gave evidence by affidavit or otherwise. It is noted that their evidence might not be readily forthcoming, being Wee's employees. But, more importantly, there is no evidence at all I from S Mahendran about what the secretary had allegedly told him. Thomas Lee was not in Wee's solicitors' office at the material time. In the circumstance, Thomas Lee's belief that Wee had, in the solicitors' office, instructed the secretary to say that he (Wee) was not in, being unsupported by evidence and evidence of stated source, has, in my opinion, hardly any evidential value, especially considering the serious nature of the motion

and the high standard of proof required, ie one of proof beyond reasonable doubt. Although hearsay evidence is admissible in affidavit under O 41 r 5(2), the court should ensure that no injustice results from its admission: *Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV & Ors (No 2)* (1988) TAER 975. True, Wee did not assert that he was not in the office at the relevant time on 10 February 1993. However, since the criminal standard of proof is to apply, silence is no evidence that he was in the office and, more importantly, that he had instructed the secretary to say that he was not in, particularly that the secretary had not given evidence by affidavit or otherwise.

For the plaintiffs, it was contended that in para 2 of Wee's affidavit dated 9 March 1993, Wee did not deny that he had instructed Ivan Wong not to accept service. In my opinion, the circumstances did not call for Wee's response for the following reasons. The said para 2 was in answer to para 8 of Thomas Lee's affidavit affirmed on 20 February 1993. In the said para 8, Thomas Lee did not allege that Wee had instructed Ivan Wong not to accept service. In other words, the situation did not arise that Wee was bound to or even expected to deny, since there is no specific or express allegation that he had instructed Ivan Wong not to accept service. The following remark of Lord Denning MR in *Re Bramblevale Ltd* [1970] Ch 128, CA about contempt of court is illustrative. He observed (at p 137A–B):

> It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence.

Of course, Lord Denning MR was talking about lies from an alleged contemnor. But in the instant appeal, the plaintiffs' case is even worse. There is no direct evidence that Wee was in the office and gave the instructions as alleged. Neither S Mahendran nor the secretary gave evidence to that effect. The belief of Thomas Lee about Wee's presence in the office and giving the instructions on 10 February 1993 at about 4.25pm being unsupported by any evidence is devoid of basis, and has hardly any evidential value.

It was suggested that Wee's presence in the office could be inferred. There is a clear distinction between a conjecture and an inference. A conjecture is not an inference. An inference must rest on premises of fact established by credible evidence. There can be no inference unless there is objective fact which the court cannot discount. In *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152, HL, Lord Wright observed (at pp 169–170):

> Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much pratical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

In our instant case, there is, as pointed out earlier, no evidence from S Mahendran or the secretary upon which Thomas Lee's alleged belief could be founded.

Another ground relied on by the plaintiffs for alleging Wee's evasion of service was Thomas Lee's belief (which found favour with the learned trial judge) that Wee had on 10 February 1993 at about 4.25pm instructed or caused Wee's solicitor, Ivan Wong, not to acknowledge receipt of the court order dated 9 February 1993. (Paragraph 6(iii) of Thomas Lee's affidavit affirmed on 11 May 1993 and para 4(a)(iii) of the statement dated 12 May 1993 pursuant to O 52 r 2(2).) The cause papers in the suit including the said court order were delivered by S Mahendran to the solicitors' firm (of which Wee was the senior partner) consequent upon the solicitors' firm's request for all the cause papers by a letter dated 10 February 1993 transmitted by facsimile. This, incidentally, must necessarily postulate a finding that Wee was in the office at the material time — a point I have already dealt with above.

Thomas Lee based his belief on matters contained in paras 8(a) and (b) of his affidavit affirmed on 20 February 1993. Hence, it is necessary to consider the said paras 8(a) and (b) which are reproduced below:

> 8(a) By a letter dated 10 February 1993, the third defendant's law firm, Messrs Wee Choo Keong & Faaiz gave notice in writing to the plaintiffs' solicitors that they were authorized to act for the third defendant, Wee Choo Keong, in the action and requested that all relevant cause papers be served on them. A copy of the said letter dated 10 February 1993 is produced before me and exhibited hereto as 'TL4'. The plaintiffs' solicitors did on 10 February 1993 serve all the relevant cause papers including the said order dated 9 February 1993 which was properly indorsed with the notice in Form 87 of the Rules of the High Court 1980 on the said firm. One Ivan Wong Ee Vern, an advocate and solicitor practising in the said firm of Messrs Wee Choo Keong & Faaiz acknowledged receipt of the covering letter and all the cause papers except the said order dated 9 February 1993. Produced before me and exhibited hereto marked 'TL5' is the affidavit of service of S Mahendran affirmed on 12 February 1993. Also produced before me and exhibited hereto marked 'TL6' is the affidavit of Leong Kwok Yan affirmed on 12 February 1993 who accompanied S Mahendran to serve the said order dated 9 February 1993.
>
> (b) By a letter dated 11 February 1993, Messrs Wee Choo Keong & Faaiz wrote to the plaintiffs' solicitors to confirm receipt of the cause papers mentioned therein but omitted to mention the said order dated 9 February 1993. The plaintiffs' solicitors in a letter dated 11 February 1993 replied that notwithstanding the deliberate omission to mention receipt of the said order dated 9 February 1993, the same had in fact been served. Produced before me and exhibited hereto marked 'TL7' and 'TL8' respectively are the letter of Messrs Wee Choo Keong & Faaiz dated 11 February 1993 and the plaintiffs' solicitors reply also dated 11 February 1993. By a letter dated 15 February 1993 Messrs Wee Choo Keong & Faaiz informed the plaintiffs' solicitors that it did not have authority to accept service of the said order dated 9 February 1993 and returned the same. Produced before me and exhibited hereto marked 'TL9' is the said letter dated 15 February 1993.

It will be seen from the above para 8 of the affidavit that there is no evidence of Wee instructing or causing his solicitor not to acknowledge the receipt of the said court order on 10 February 1993 at about 4.25pm. In fact it was the plaintiffs' own case that the court order had been served. See also Messrs Cheang & Ariff's letter dated 11 February 1993 (exh TL8) where it was stated that the said court order was 'deemed served'. See further the affidavit of S Mahendran (process server) affirmed on 12 February 1993 in which he said that he 'left the said cause papers including the court order dated 9 February 1993 with the said Mr Ivan Wong Ee Vern'.

Encik Raja Aziz Addruse, counsel for Wee also accepted, in his submission, that service of the court order had been effected on 10 February 1993 at about 4.25pm.

In the light of the stand taken by the plaintiffs, ie that the court order had been served on 10 February 1993 by leaving a copy thereof with Wee's solicitor, who the learned trial judge found having been instructed to accept service thereof, it bewildered me how Wee could be guilty of evasion of service by omitting to make reference of the receipt of the court order in his solicitors' letter dated 11 February 1993, and by returning the said court order under letter dated 15 February 1993, when the court order, as conceded by the plaintiffs, had already been served!

Diverting a little, it may be added here that the charge against Wee was that he evaded service of the said court order on 10 February 1993 at about 4.25pm. Yet there is absolutely no evidence from either the process server, S Mahendran, or his companion, Leong Kwok Yan, that they or either of them had asked for Wee and, more importantly, indicated any wish to serve Wee personally whilst they were in the office of Messrs Wee Choo Keong & Faaiz that afternoon. Wee, on the other hand, in para 2 of his affidavit dated 9 March 1993, had affirmed that he was not evading service, and contended that the court order must be personally served. This, it must be noted, was deposed to more than two months before the motion for evasion of service was taken out.

Paragraph 5 of the affidavits of S Mahendran and Leong Kwok Yan both affirmed on 12 February 1993 and filed on behalf of the plaintiffs, were that it was Ivan Wong who refused to acknowledge the receipt of the court order. As to this, Ivan explained in para 4 of his affidavit affirmed on 19 May 1993 which reads:

> I took all the cause papers to a large conference table in our library in order to go through each of them as the receptionist's table was too small. When I went through the documents, I thought that the said order of court should be personally served so I consulted the Rules of the High Court 1980 and it confirmed my view. I then took all the cause papers back to the reception area and I told S Mahendran about my view that the order must be personally served. He replied that it need not be personally served because our firm has given authority to accept service of all cause papers. In the circumstances, S Mahendran stated that the cause papers including the said order was deemed served.

There is no dispute from S Mahendran on the above. In fact, on the evidence, Ivan Wong expressed his view that the court order should be

served on Wee personally, but S Mahendran maintained otherwise, insisting that service of the court order on Ivan Wong as Wee's solicitor was good.

On the evidence on record, it appears credible that Ivan Wong was, at the material time, honestly labouring under the belief that the injunction order had to be personally served (which, as a general rule, is the requirement in law). My view is fortified by the fact that the letter dated 10 February 1993 from Messrs Wee Choo Keong & Faaiz to Messrs Cheang & Ariff requesting for service of all cause papers made no express mention of the court order, but the court order was brought to be served, quite properly brought, of course. Faced with the situation, it is quite probable that Ivan Wong consulted the law. To my mind, his explanation is plausible. Moreover, his belief of the requirement of personal service of the injunction order had some legal merit. In the result, it is my opinion that the belief of Thomas Lee was not grounded on any sound basis.

Moreover, though a person receiving a legal process or court order is usually enjoined to acknowledge receipt by signing, this is a precautionary measure intended to afford evidence of service, and is not an essential part to complete service for the proof of which various means may be adopted, eg by the process server proving the service. It therefore follows that the refusal to acknowledge receipt of a legal process or court order is, in itself, no evasion of service, particularly where it is the case of the serving party (the plaintiffs in our present case) that service had been effected by leaving the document with the party to be served.

Similarly where, as here, the case of a plaintiff is that the court order had been served on a defendant, the subsequent return of the court order by the latter, in itself, does not, in my opinion, constitute evasion of service. If the plaintiff is, in law, right about the validity of the service, the defendant is, in effect, served whether he returns the document served or not.

It is therefore my view that since, as conceded by the plaintiffs in our present case, the court order had been served, there can be no evasion of service by the omission to mention receipt of the court order in the correspondence and by the return of the court order. Service had already been effected.

I should also mention that in the statement made pursuant to O 52 r 2(2) dated 12 May 1993, two of the grounds relied on by the plaintiffs were in the form of affirmative assertions, ie that the third defendant 'did instruct''did instruct or cause' (see para 4(a)(iii) and para 4(a)(iv) of the statement appearing on p 139 of the appeal record), but in Thomas Lee's affidavit made on 11 May 1993 verifying the facts in support of the grounds, the firm affirmative assertions were reduced to a weaker tone by the use of the words 'believe' or 'verily believe'. (See paras 6(iii) and (iv) of Thomas Lee's affidavit affirmed on 11 May 1993 appearing on pp 515 and 516 of the appeal record.)

The last grounds relied on by the plaintiffs in support of this motion for contempt by evasion of service are:

(i) that by their letter dated 11 February 1993 (exh TL7) written on Wee's instructions confirming receipt of the cause papers, Wee's

solicitors omitted to mention receipt of the court order dated 9 February 1993; A

(ii) Thomas Lee's belief that the omission in (i) above was intentional or wilful; and

(iii) that Wee's solicitors by letter dated 15 February 1993 (exh TL9) did return the said court order to the plaintiffs' solicitors. B

The evidence in support of the above contentions is in paras 6(v) and (vi) of Thomas Lee's affidavit dated 11 May 1993. The related grounds are in paras 4(a)(v) and (vi) of the statement dated 12 May 1993 pursuant to O 52 r 2(2).

The said paras 6(v) and (vi) of Thomas Lee's affidavit dated 11 May 1993 read: C

(v) The said solicitors did by a letter dated 11 February 1993 and exhibited in my affidavit affirmed on 20 February 1993 (encl 14) and marked as TL7 confirmed receipt of the cause papers mentioned therein but omitted to mention receipt of the said order dated 9 February 1993. D

I verily believe that the said solicitors had intentionally or wilfully omitted any reference to the said order dated 9 February 1993 although the said solicitors had received the same. The said solicitors had already acknowledged receipt of the cause papers by signing on the back page of each of the cause papers on 10 February 1993 (except the said order dated 9 February 1993) and on the covering letter of the plaintiffs' E solicitors exhibited as 'SM6' in the affidavit of S Mahendran affirmed on 12 February 1993. There was therefore no necessity for such a letter (TL7) except to intentionally create evidence to provide that the said order was not served by writing the aforesaid. In any event the said solicitors by their letter dated 15 February 1993 and exhibited in my affidavit affirmed on 20 February 1993 (encl 14) and marked as TL9 F clearly shows that the omission was wilful and intentional. The letter TL9 was written in reply to the plaintiffs' solicitors' letter dated 11 February 1993 and marked as TL8 in the same affidavit. From the letter TL9, it is noted that the said solicitors had acted at all material times under the instructions of the third defendant which instructions must by necessity include the sending of the letter TL7. G

(vi) The said solicitors did by their letter dated 15 February 1993, marked as TL9 and exhibited to my affidavit affirmed on 20 February 1993 (encl 14) returned the said order dated 9 February 1993 to the plaintiffs' solicitors.

The two letters dated 11 February 1993 (exh TL7) and 15 February 1993 H (exh TL9), and the plaintiffs'-solicitors' letter dated 11 February 1993 (exh TL8) are reproduced below (letter from M/s Wee Choo Keong & Faaiz):

Date: 11 February 1993

I

Messrs Cheang & Ariff
Advocates and solicitors
39 Court
39 Jalan Yap Kwan Seng
50450 Kuala Lumpur

By fax and post

Dear Sirs

KL High Court Civil Suit No S4–22–75–93
MBf Holdings Bhd and MBf Finance Bhd v Houng Hai Kong, Loi Hean Sso and Wee Choo Keong

We refer to your letter of 10 February 1993 and confirm receiving the following documents:

1 writ of summons dated 9 February 1993;

2 summons in chambers (ex parte) dated 9 February 1993; and

3 supporting affidavits of Patrick Chen Yee Ching and Thomas Lee Khoon Seng both affirmed on 9 February 1993.

Yours faithfully
—Sgd—

Letter from Messrs Cheang & Ariff:

11 February 1993

Messrs Wee Choo Keong & Faaiz
Advocates and solicitors
20th Floor Suite 20.3
Bangunan Kuwasa
Jalan Raja Laut
50746 Kuala Lumpur

Dear Sirs

KL High Court Civil Suit No: S4–22–75–93
MBf Holdings Bhd and MBf Finance Bhd v Houng Hai Kong, Loi Hean Sso and Wee Choo Keong

Thank you for your facsimile dated 11 February 1993.

In all the circumstances, it did not surprise us that your client would instruct you to send the facsimile confirming receipt of all cause papers except the order of court. The cause papers mentioned in your letter were served on your firm pursuant to your letter dated 10 February 1993. These were served by our clerk, Mr S Mahendran in the presence of Mr Leong Kwok Yan who accompanied the former. Mr Ivan Wong of your office acknowledged receipt of all the cause papers but refused to acknowledge receipt of the order and whereupon, a copy of the order together with the rest of the cause papers were left at the receptionist's table. Mr Ivan Wong's attention was drawn to the order and was also told that notwithstanding the fact that he had refused to acknowledge the order, the order is deemed served.

We should point out that your office had acknoweldged receipt of our letter and in which the order was specifically mentioned. Additionally, Mr Ivan Wong's conduct is only explicable by facts which are peculiarly within his knowledge, namely, he only refused to acknowledge receipt of the order after he had gone back into the office from the reception area and presumably decided to refuse acknowledgment of the order after he had conferred with his superior. Here, Mr Ivan Wong had in his physical custody all the cause papers and the order when he went into the office

proper from the reception area and our process servers were specifically told, when they first arrived, that your client, Mr Wee Choo Keong, was in the office though the receptionist was later contradicted by the secretary of Mr Wee.

Our clients will not hesitate to take such action as may be appropriate to strictly enforce the court order dated 9 February 1993. A copy of the order is enclosed again but not in derogation of any of our statements set forth above.

Yours faithfully
—Sgd—

Letter from Messrs Wee Choo Keong & Faaiz:

15 February 1993

Messrs Cheang & Ariff
Advocates and solicitors
39 Court
39 Jalan Yap Kwan Seng
50450 Kuala Lumpur

By hand

Dear Sirs

KL High Court Civil Suit No S4–22–75–93
MBf Holdings Bhd and MBf Finance Bhd v Houng Hai Kong, Loi Hean Sso and Wee Choo Keong

We refer to your letter of 11 February 1993 and our letter of even date.

We do not wish to enter into a long debate with you over the sequence of the events as we feel that it is a futile exercise.

Please be informed that we have no authority to accept service of the order. Therefore, we return a copy of the order to you.

Yours faithfully
—Sgd—

It is relevant to note that:

(1) in Messrs Cheang & Ariff's letter dated 11 February 1993, the following sentences and words were used: 'The cause papers ... were served on your firm', '... the order is deemed served' and 'presumably'; and

(2) Messrs Cheang & Ariff's said letter dated 11 February 1993 and Messrs Wee Choo Keong & Faaiz's reply dated 15 February 1993 must be read together. Thus read, it is clear that the last paragraph of the said reply dated 15 February 1993 about having no authority to accept service relates to the dispute between the parties as to the validity of the service of the injunction court order on Mr Ivan Wong on 10 February 1993 at about 4.25pm. In other words, the dispute was on the validity of the service of the court order: whereas the contention of Messrs Cheang & Ariff, acting for the plaintiffs, was that the service of the court order on Mr Ivan Wong in the circumstances as occurred on 10 February 1993 at about 4.25pm (the circumstances are shown in the relevant affidavit evidence in our

present case) was good service, Messrs Wee Choo Keong & Faaiz, acting for Wee, maintained otherwise. It was under such circumstances that the last paragraph of the said reply dated 15 February 1993 was written, and it ought to be read with such circumstances in mind.

It cannot be doubted that the sending of the two letters dated 11 February 1993 (exh TL7) and 15 February 1993 (exh TL9) was intentional and wilful. The question is: can they constitute valid grounds for holding that the plaintiffs' charge of evasion of service of the court order dated 9 February 1993 on the part of Wee was proved beyond reasonable doubt? I think not. The circumstances prevailing at the time of service of the court order on 10 February 1993 at about 4.25pm, and the then state of mind of the parties are material for consideration.

First, as conceded by the plaintiffs, the court order had been served (see exh LT8 at paras 8(a) and (b) of Thomas Lee's affidavit dated 20 February 1993). That being so, no amount of omissions or failures to mention receipt of the court order or returning the court order to the plaintiffs' solicitors could constitute evasion of service for the simple reason that service, as conceded by the plaintiffs, had already been effected. I have dealt with this earlier.

Secondly, Ivan Wong, in response to the motion, had explained in paras 4 and 6 of his affidavit dated 19 May 1993, that the reasons he refused to accept service of the court order on 10 February 1993 and returned it was that according to the Rules of the High Court 1980, he had no authority to accept service of an order of personal character, and that his view was that under the law it had to be served personally on Wee. An honest and reasonable belief in the existence of circumstances which, if true, would make an act for which a defendant is charged an innocent act, will amount to good defence. In view of Ivan Wong's evidence above, the omission or failure to mention receipt of the court order (in the sense of accepting valid service) in Wee's solicitors' letter dated 11 February 1993 (exh TL7) and the return of the court order vide letter dated 15 February 1993 (exh TL9) are, at least, equally consistent with the probability that the omission or failure to mention the court order in the letter, and the return thereof relate to genuine dispute of the propriety of service on point of law rather than to evasion of service of the court order, which, in any event, on the plaintiffs' own contention, as pointed out earlier, had already been served. As observed by Lord Denning MR in *Re Bramblevale Ltd* [1970] Ch 128 at p 137E–F, 'Where there are two equally consistent possibilities open to the court, it is not right to hold that the offence is proved beyond reasonable doubt.'

One last point, the statement pursuant to O 52 r 2(2) alleged Wee gave instructions to write the letter dated 11 February 1993 between 10 February 1993 and 15 February 1993, in normal circumstances would instructions be given retrospectively, ie between 12 and 15 February 1993 after the letter was written? At least there ought to have been some explanation from the plaintiffs.

It is incumbent upon the plaintiffs to prove beyond reasonable doubt not only that Wee at the material time on 10 February 1993 at about 4.25pm was in his office, but also that the alleged acts and/or omissions by

Ivan Wong were done on the instructions of Wee and were sufficient to constitute evasion of service of the court order on the part of Wee. After careful deliberation of submissions by counsel for both sides and detailed examination and analysis of all relevant evidence adduced in the form of affidavits and exhibits, I was of the view that the evidence, taken in totality, was insufficient to prove or fell short of proving to the criminal standard, ie beyond reasonable doubt the charge of contempt by evasion of service of the court order dated 9 February 1993 as alleged.

I would therefore allow the appeal.

6 November 1995

Wan Adnan FCJ: I have had the advantage of reading the judgment of Lamin PCA, dated 4 November 1994.

I agree that the appeal by the first appellant (the first defendant) be allowed and the sentence imposed be set aside. I also agree that the appeal of the second appellant (third defendant) in respect of the offence of the disobedience of the court order be allowed, and the sentences imposed be set aside, and I agree that for the offence of evading service of the court order there was sufficient evidence for the learned trial judge to find him guilty thereof. I also agree that for this offence a fine of RM7,000 is appropriate in the circumstances of the case.

I would like to respond to two legal points raised in arguments by the learned counsel for the second appellant (third defendant). But first, I like to say something on the standard of proof that is required to prove a charge in contempt of court proceedings. It is already well established that in contempt of court proceedings, proof must be proof beyond reasonable doubt, and that where there is a doubt the doubt ought to be resolved in favour of the person charged. In other words, the proof must be of the standard as is required in a criminal case.

In *Alligarh Municipal Board & Ors v Ekka Tonga Mazdoor Union & Ors* AIR 1970 SC 1707, it was held:

> In order to bring home a charge of contempt of court for disobeying orders of courts those who assert that the alleged contemners had knowledge of the order must prove the fact beyond reasonable doubt ... In case of doubt, however, the benefit ought to go to the person charged.

In *Loot Ting Yee v Tan Sri Sheikh Hussein bin Sheikh Mohamed & Ors* [1982] 1 MLJ 321, the applicant had applied to the High Court to commit the respondents for the alleged contempt of court. The application was dismissed in the High Court and in the Federal Court. The applicant then applied for leave to appeal to the Yang DiPertuan Agong.

Suffian LP on behalf of the Federal Court said:

> With respect we are of the opinion that the learned trial judge's decision was in a criminal matter and therefore there is no right of appeal beyond the Federal Court.

In *Re Bramblevale Ltd* [1970] Ch 128, Lord Denning said:

> A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him.

The learned counsel for the second appellant (third defendant) had submitted that the injunction order dated 9 February 1993 ought not to have been issued by the court because:

(1) a court would grant an injunction only to support a legal right (*Montgomery v Montgomery* [1964] 2 All ER 22; [1964] 2 WLR 1036), and there was no legal right of the plaintiffs to be protected;

(2) the injunction granted was too wide, and an injunction must be precise (*Garden Cottage Foods v Milk Marketing Board* [1983] 2 All ER 770; [1983] 3 WLR 143); and

(3) the injunction order was made without jurisdiction.

In my view, these points are not relevant in contempt of court proceedings. They are relevant and may be valid in proceedings to set aside the injunction. In the instant case, the interim injunction order was made ex parte. Until and unless it is set aside, the order is valid and must be obeyed. In my view, the correct position is that once an interim injunction has been granted, it must be obeyed. If the person against whom the order is made feels that the injunction order ought not to have been made for any reason, he must apply to have it set aside. Until it is set aside, he must respect and obey it. (See *Wee Choo Keong v MBf Holdings & Anor and another appeal* [1993] 2 MLJ 219.)

The other point submitted by the learned counsel for the second appellant (third defendant) was that the trial judge should have heard the defendants' application to set aside the interim injunction first before hearing the plaintiff's application for committal. The decision of the learned trial judge refusing the defendants' application to be heard first went to the Supreme Court on appeal, and the Supreme Court had dismissed the appeal.

In my view, even if the trial judge had allowed the defendants to proceed first with their application to set aside the injunction order, and if they had succeeded in setting aside the order, this would not affect the culpability of the defendants for their disobedience of the injunction order before it was set aside if the allegations of disobedience had been proved. The contempt of court had been committed before the discharge of the order. There would not have been any difference.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim